

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN, et al.,

Plaintiffs,

V.

**ELISABETH DEVOS, in her official capacity
as Secretary of the U.S. Department of
Education, et al.**

Defendants.

Case No. 19-986 (RDM)

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs’ motion for a preliminary injunction should be denied as moot because, effective June 6, 2019, the Department of Education has provided access to Public Citizen’s website through its guest Wi-Fi network as well as through internal agency network. (Hernandez Decl. ¶ 5) Accordingly, Plaintiffs’ motion for a preliminary injunction should be denied.

ARGUMENT

Plaintiffs have filed this lawsuit seeking relief under the First Amendment and Administrative Procedure Act from an alleged “decision” by the Department of Education to block access to Public Citizen’s website from the Department’s internal network and guest Wi-Fi network. Public Citizen alleges that, on one occasion in February 2019, one of its staff members, Mr. Llewelyn, was unable to access Public Citizen’s website utilizing the Department’s guest Wi-Fi network. (Compl. ¶ 13) Plaintiff also alleges that another member of Public Citizen, Mr. Halperin, had the same experience in March 2019 and that this individual has been unable to access Public Citizen’s website through the Department’s guest Wi-Fi network for “approximately the past year.” (Compl. ¶ 16) Although perhaps implying that there was a period of time when Mr.

Halperin could access Public Citizen’s website through the Department’s guest Wi-Fi network, the Complaint does not specifically make that factual assertion. Nor does Mr. Halperin in his declaration accompanying the motion for preliminary injunction attest that he, in fact, had in the past successfully accessed Public Citizen’s website utilizing the guest Wi-Fi network. Thus, although the Complaint speculates about an unspecified recent “decision” to block access to Public Citizen’s website, the specific allegations in the Complaint do not support that speculation.

As set forth in the accompanying Hernandez Declaration, on June 4, 2019, the Department submitted a request to its vendor to grant access to Public Citizen’s website. (Hernandez Decl. ¶ 4). Effective June 6, 2019, access to Public Citizen’s website was available through the Department’s internal network and its guest Wi-Fi network. (*Id.* ¶ 5) Consequently, Plaintiffs’ motion for preliminary injunction, which claims that the lack of access to Public Citizen’s website is causing irreparable harm and seeks an order enjoining the Department from blocking such access, should be denied as moot. *See, e.g., In re Howard*, 2014 U.S. App. LEXIS 13380, at *3 (D.C. Cir. July 14, 2014) (“Any injunctive relief concerning appellant’s student loans would be moot, as they have been discharged”); *Nat’l Parks Conservation Ass’n v. Dep’t of Interior*, 794 F. Supp. 2d 39, 44 (D.D.C. 2011) (“If . . . an agency does respond to a petition, even after a suit to compel a response is filed, such a suit is rendered moot.”).

“The rule against deciding moot cases forbids federal courts from rendering advisory opinions or ‘deciding questions that cannot affect the rights of litigants in the case before them.’” *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006) (citations omitted). In *Hall*, the Court dismissed as moot Hall’s challenge to the agency’s denial of his FOIA fee waiver request after the agency decided to release records to Hall without seeking payment from him. *Id.* Because Hall “already

has ‘obtained everything that [he] could recover . . . by a judgment of this court in [his] favor,’” there was no case or controversy before the Court. The Court also held that “Hall fails to undermine the government’s mootness claim with his argument that the media status claim is capable of repetition, yet evading review.” *Id.* Even “[a]ssuming in Hall’s favor that the matter is capable of repetition,” the Court “fail[ed] to see how the issue has any tendency to evade review” because “[d]enials of fee waivers do not seem inherently of such short duration that they cannot ordinarily be fully litigated before their cessation.” *Id.*

As regards the motion for preliminary injunction, the same analysis applies here. Access to Public Citizen’s website, which is the only relief sought in the motion for preliminary injunction, has been granted. Thus, Plaintiffs have obtained everything they could recover through that motion and this issue – like a denial of a FOIA fee waiver – is not “inherently of such short duration” as to have “any tendency to evade review.” *See id.* Thus, as in *Hall*, the exception to the mootness doctrine for cases “capable of repetition, yet evading review” is inapplicable. *See People for the Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 424 (D.C. Cir. 2005) (“But if we are wrong about the possibility of repetition, we would still find the preliminary injunction moot because we are unconvinced that if a controversy of this sort occurred again it would evade judicial review”).

Because the motion for preliminary injunction is moot, Defendants are not addressing the merits of that motion, but reserve the right to do so at a later date should the Court not find the motion to be moot. Likewise, Defendants also maintain that the lawsuit itself is now moot, but will address that issue more fully when it files its response to the Complaint in accordance with the schedule set by the Court at the hearing on May 28, 2019. In that regard, Defendants note

that, in the parties' conferral as to the status of this matter on June 7, 2019, counsel for Plaintiffs indicated that Plaintiffs may raise the "voluntary cessation" doctrine in response to any motion by Defendants to dismiss this case as moot. Accordingly, Defendant will address that doctrine when it files its response to the Complaint, which it currently anticipates will be in the form of a motion to dismiss on mootness grounds.

For present purposes, however, it suffices to observe that Plaintiffs must show that they face a "present or imminent risk of likely irreparable harm" in order to obtain injunctive relief. *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 162 (2010). The Department's declarant has attested that "[t]he Department will not take any action to block access to Public Citizen's website through its internal and guest-WiFi networks, except in the event of a security risk (e.g., if Public Citizen's website were hacked or otherwise compromised) or a technical issue (e.g., bandwidth consumption) that may compromise the secure and proper functioning of the Department's networks." (Hernandez Decl. ¶ 6) Thus, there is no present or imminent risk of irreparable harm to warrant the issuance of a preliminary injunction. *See also Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 193 (D.D.C. 2005) ("Because preliminary injunctions are extraordinary forms of judicial relief, courts should grant them sparingly."); *cf. City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982) (voluntary cessation of challenged practice "is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice").

CONCLUSION

For the foregoing reasons, the motion for preliminary injunction should be denied.

Respectfully submitted,

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ORDER

Upon consideration of Plaintiff's Motion for a Preliminary Injunction, the opposition thereto, and the entire record herein, it is this _____ day of June 2019,

ORDERED that Plaintiff's Motion is **DENIED**.

SO ORDERED.

United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civil Action No. 19-CV-986 (RDM)
)	
v.)	
)	
ELIZABETH DEVOS, Secretary,)	
U.S. Department of Education.)	
)	
Defendant.)	

DECLARATION OF STEVEN HERNANDEZ

I, STEVEN HERNANDEZ, declare that the following statements are true:

1. I am over 21 years of age and am competent to testify on the matters set forth herein.
2. I am employed as the Chief Information Security Officer and Director of Information Assurance Services in the United States Department of Education (Department). I have served in this position, in either an acting or a permanent capacity, since December 10, 2017.
3. As the Chief Information Security Officer, my position serves as the Director, Information Assurance Services (IAS) and principal advisor to the Chief Information Officer (CIO) and Deputy Chief Information Officer (DCIO). I have full responsibility for managing Information Assurance Services operations to ensure that the confidentiality/privacy, integrity, and availability of the Department's information and information resources. I am responsible for ensuring the compliance and implementation of the Federal Information Security Management Act and E-Government Act.
4. On Tuesday, June 4, 2019, the Department submitted a request to its vendor to grant access to Public Citizen's website (www.citizen.org).

5. As of Thursday, June 6, 2019, access to Public Citizen's website was available across the Department's networks, including through the Department's internal network and the Department's guest Wi-Fi network. I have attached a screenshot reflecting that access has been granted through the Department's internal network (exhibit 1 hereto) and guest Wi-Fi network (exhibit 2 hereto).
6. The Department will not take any action to block access to Public Citizen's website through its internal and guest-WiFi networks, except in the event of a security risk (e.g., if Public Citizen's website were hacked or otherwise compromised) or a technical issue (e.g., bandwidth consumption) that may compromise the secure and proper functioning of the Department's networks.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, DC, this 11th day of June, 2019

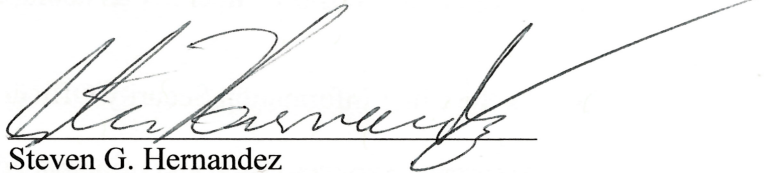

Steven G. Hernandez

Exhibit 1



Help Win Medicare for All

Pass a Local Medicare for All Resolution ☐

GET INVOLVED



Public Citizen ☐

TAKE ACTION NOW



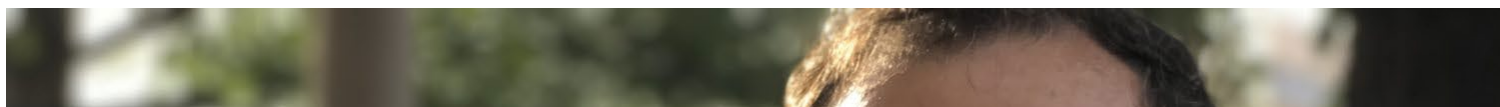
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Exhibit 2



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